No. 5[illegible] 413

In the Supreme Court of the United States

OCTOBER TERM, 1956

STEFENA BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 41–48) is reported at 234 F. 2d 140. The opinion of the District Court appears at R. 38–40.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1956 (R. 41), and a petition for rehearing was denied on June 12, 1956 (R. 49). The petition for a writ of certiorari was filed on July 12, 1956, and was granted on November 13, 1956 (R. 49).

QUESTION PRESENTED

Whether, upon the facts of this case, petitioner's election to take the stand and to give lengthy testi-

mony, as a witness in her own behalf, in answer to allegations made in the Government's complaint, constituted a waiver of her privilege against self-incrimination and accordingly exposed her to the requirement of answering certain material questions addressed to her on cross-examination.

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Sixth Circuit unanimously affirming the judgment of the District Court for the Eastern District of Michigan, which held petitioner guilty of contempt and sentenced her to imprisonment for six months. The holding of contempt was grounded upon petitioner's refusal, during cross-examination in a denaturalization suit against her, to answer questions relating to membership in the Communist Party, after she had voluntarily testified in her own defense.

The complaint, seeking cancellation of petitioner's citizenship, was filed in April 1953, pursuant to Section 340 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U. S. C. 1451 (a), charging that citizenship had been procured, in 1946, by wilful misrepresentation and concealment of material facts (R. 1–6). According to the complaint, on August 22, 1946, in testimony before naturalization examiners and in her petition for naturalization, petitioner had falsely stated, under oath, that she had not been for a period of at least 10 years preceding that date a member of, or affiliated with, any organization teaching disbelief in or opposition to organized government; that she was not a disbeliever in organ-

ized government; that she was attached to the principles of the Constitution; and that she never was a member of the Communist Party (R. 2–3). The complaint alleged that from 1933 to at least February 1937 she had been a member of the Communist Party of the United States and of the Young Communist League, organizations that taught the overthrow by force and violence of the Government of the United States (R. 3). No appeal was taken from the judgment of the District Court cancelling petitioner's citizenship (Pet. Br. 7).

At the trial, petitioner was called by the Government as a witness pursuant to Rule 43 (b) of the Federal Rules of Civil Procedure. During her testimony under the rule, she denied membership in the Communist Party prior to her naturalization in 1946, and invoked the privilege against self-incrimination as to all questions concerning Communist Party membership and activities where the questions were unlimited in time or addressed to the period subsequent to 1946. In each instance, the District Judge sustained her claim of privilege (R. 11–19).

After conclusion of this examination under the rule, petitioner was not cross-examined by her counsel since he desired to "put her on on direct" (R. 19). Upon conclusion of the Government's case,[1] petitioner voluntarily became a witness in her own behalf (R. 19).

[1] Although petitioner's is the only testimony contained in the record before the Court, it is clear that there was independent evidence adduced to show membership in the Communist Party (see Pet. Br. 4). Throughout her examination by the Government, petitioner was questioned as to whether she knew certain

As a witness in her own behalf, petitioner testified to her membership and activities in the Young Communist League from about 1930 to January 1935 (the date of her alleged resignation) and stated that she had not engaged in any Communist activity from 1935 until her naturalization in 1946 (R. 20–22). She also affirmed the truthfulness of her statements made under oath in the period leading up to her naturalization (R. 24–25). She then testified concerning her activities and loyalties down to the date of the trial, as follows:

"Q. Are you willing to take up arms in defense of this country, in the event of any hostility between the United States and Russia?

"A. Yes.

"Q. Regardless of whatever the reason may be for any hostility between the government of the United States and the Government of Russia?

"A. That is correct.

"Q. In Question 28 you were asked: 'Are you a believer in anarchy, or the unlawful damage, injury or destruction of property, or of sabotage'? And you answered 'No'.

"Was that a true answer to that question?

"A. That was a true answer.

"Q. You say it was not only a true answer at the time you filed the petition, July 16, 1946, and is that the true answer today?

"A. It is true. It was a perfectly true answer to that question. I never believed in overthrowing any-

named individuals, and whether she was connected with them in Communist activity (R. 12, 15–18, 35).

thing. I believe in fighting for this country. I like this country. I never told anybody I didn't.

"Q. Did you ever teach or advocate anarchy or overthrow of the existing government in this country?

"A. Teach?

"Q. Did you ever teach the idea that we ought to overthrow the government of the United States?

"A. No, I never did.

"Q. Did you ever advocate that?

"A. No.

"Q. Did you ever say that we should?

"A. No, I never did.

"Q. To your knowledge, did you ever belong to any organizatio. that taught or advocated anarchy or the overthrow of the existing government in this country?

"A. No. As much as I know, I didn't belong, to destroy the country. I believe in helping the country, and helping the people. That was my life of living, not destroying the things that the people put up.

"Q. Are you attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States?

"A. That, I am." (R. 26.)

When, on cross-examination, she was asked whether she was now, or had ever been, a member of the Communist Party of the United States, petitioner claimed her privileg, under the Fifth Amendment (R. 32–33). The District Court ruled that, having taken the stand in her own defense, petitioner had waived her privilege, and directed her to answer (R. 33). Despite this directive, petitioner continued in her refusal and, as

a result, was held in contempt of court (R. 33-34, 38-40). Further contempt citations followed upon her refusal to answer related questions, either unlimited in time or directed specifically to the post-naturalization period, as to whether she attended Communist meetings and classes, and, in general, seeking to establish that she was an active member of the Party (R. 34-38). A number of these questions were precisely the same as those asked by the Government when petitioner was a witness under Rule 43 (b).

The Court of Appeals unanimously affirmed the contempt conviction on the ground that her voluntary testimony in her own behalf was of such nature that petitioner waived her privilege against self-incrimination.

SUMMARY OF ARGUMENT

1. In a denaturalization trial based on the charge that, on August 22, 1946, petitioner had given false testimony as to her then loyalties to the United States and as to her Communist Party affiliations for the preceding ten years, petitioner was first called as an involuntary witness. Her claim of privilege as to questions concerning her post-1946 Communist connections and activities was sustained—although her post-naturalization affiliations were directly relevant to the veracity of her statements made in the period leading up to her naturalization (*Knauer* v. *United States*, 328 U. S. 654, 668). Thereafter, petitioner elected to take the stand, this time as a witness in her own behalf, and testified that statements made during the naturalization proceeding were true when made; she further asserted her present loyalty to the United

States and non-membership, at any time, in any organization advocating overthrow of the Government of the United States. On cross-examination, she claimed the privilege as to questions concerning membership in the Communist Party immediately after 1946—questions directly bearing on the issues in the case and, most particularly, upon specific assertions made on direct examination. She was therefore properly held to have waived her privilege as to such cross-examination. For if, as is well settled, the criminal defendant by voluntarily testifying waives his privilege as to all material facts (*Raffel* v. *United States*, 271 U. S. 494), petitioner by freely testifying to her version of the case certainly waived her privilege against self-incrimination as to material cross-examination seeking to contradict her specific self-serving declarations.

To hold otherwise would allow in evidence petitioner's version of the case without her assertions being put to the test of truthfulness by relevant cross-examination. Such a result would be in direct negation of the fundamental concept that in an adversary proceeding testimony not subject to cross-examination is not proper testimony. Since, if the privilege is recognized, no inference may be drawn from the claim of privilege, the net result would be an opportunity to present a wholly one-sided and self-serving version of events.

Petitioner has not the slightest basis for claiming surprise at the Government's line of questioning. She was on notice that it would be pursued. More-

over, on direct examination by her own counsel, petitioner went into the very subject matter which she refused to discuss when relevant questions were put by opposing counsel.

2. Petitioner can obtain no comfort from cases which stand for the proposition that an *involuntary* witness does not waive his privilege until he proceeds to make an incriminatory disclosure. A witness who is subject to an order to testify, whether before a court or an inquisitorial body, has no option to assert a privilege until an incriminatory question is posed. Consequently, he cannot be deemed to have made any choices until such time as he chooses to respond to a line of inquiry which he might have closed off. But petitioner here had a choice. She was a voluntary witness. She was not compelled to take the stand in her own behalf. Beyond that, she chose, on direct examination, to deal with the very subject matter which she refused to discuss on cross-examination. The privilege is a privilege to remain silent. It is not a haven against contradiction. There is no privilege to tell an incomplete or a one-sided story and then close the door when an effort is made to test that story by cross-examination. It was appropriate, therefore, to exercise the contempt power in order to vindicate the principle, vital to the judicial process, that the court and the parties are entitled to all relevant testimony which is not privileged.

3. The Court of Appeals, in sustaining the contempt conviction, did not do so on grounds at variance with the original contempt citation of the District Court. At most, the Court of Appeals, relying

on the record before it, narrowed the finding of waiver from one conditioned only upon petitioner's voluntarily having been sworn as a witness to one holding that petitioner's voluntary, self-serving assertions resulted in waiver of the privilege as to relevant cross-examination on such testimony. In no sense can this be deemed equivalent to convicting petitioner on a charge not made.

ARGUMENT

We emphasize, at the outset, that the issue here is narrow—whether a defendant in a civil suit, who voluntarily took the stand and testified in her own behalf, could refuse, on the ground of privilege, to answer questions put to her on cross-examination which were directly relevant to the matters at issue and to the subject matter of her direct examination. This is not the case of a witness before an inquisitorial body. It is not the case of an ordinary witness in a civil suit who is compelled, by process of the court, to testify. When petitioner was called as such an involuntary witness, her claim of privilege was sustained. This is a witness who chose to take the stand in her own behalf and to answer questions on direct examination which related not only to her pre-naturalization, but also to her post-naturalization, loyalty to the United States. Then, faced with cross-examination as to matters which would have a direct bearing on the veracity of her specific assertions and her general credibility as a witness, she refused to answer those questions. The Government's basic position is that, in a trial in our courts, where the right of cross-

examination is regarded as a fundamental means of developing truth, a witness may not, by her own choice of strategy, present such a one-sided picture.

I

BY HER DIRECT TESTIMONY, VOLUNTARILY GIVEN, PETITIONER NECESSARILY WAIVED HER PRIVILEGE AND ASSUMED THE DUTY TO RESPOND TO RELEVANT CROSS-EXAMINATION

The law is settled that the criminally accused waives his privilege against self-incrimination by voluntarily taking the stand in his own defense. *Johnson* v. *United States*, 318 U. S. 189; *Raffel* v. *United States*, 271 U. S. 494; see, also, *Caminetti* v. *United States*, 242 U. S. 470, 492–495; *Powers* v. *United States*, 223 U. S. 303; *Fitzpatrick* v. *United States*, 178 U. S. 304, 315; *Reagan* v. *United States*, 157 U. S. 301, 305. The logic of this rule is that the one ultimate issue involved is the defendant's guilt or innocence; and that, by voluntarily taking the stand, in circumstances when every relevant question is necessarily either incriminatory or relevantly connected to an incriminatory inquiry, the defendant must be taken to have signified his intelligent choice to waive his privilege against self-incrimination. *Johnson*, *supra*, at 195; 8 *Wigmore on Evidence* (3d ed. 1940) § 2276.

That ratio rule is directly applicable to the facts of this case, albeit this is a civil proceeding. The issue involved was whether petitioner had, on August 22, 1946, wilfully given false testimony as to her then loyalty to the United States and as to her membership, during the preceding ten years, in the Commu-

nist Party of the United States. Proof that, immediately after the specific date of naturalization, she joined and thereafter retained membership in the Communist Party would be directly relevant to the issue of the veracity of her statements in the naturalization proceeding (*Knauer* v. *United States*, 328 U. S. 654, 668; *United States* v. *Eichenlaub*, 180 F. 2d 314, 316–317 (C. A. 2), certiorari denied, 339 U. S. 983; *Orth* v. *United States*, 142 F. 2d 969, 973 (C. A. 4)). Even so, so long as petitioner was an involuntary witness called by the Government, the District Court sustained her claim of privilege. But petitioner was not content to let matters rest there. She elected to take the stand again in order to testify as a witness in her own behalf. She did so, knowing full well that her post-1946 Communist affiliations were deemed by the Government relevant to the issue in the case. What is more, she proceeded, on her direct examination by her own counsel, to testify not only as to her pre-1946, but also as to her post-1946, sentiments and conduct. Cross-examination as to her Communist affiliations immediately after naturalization thus became directly relevant not only on the ultimate issue before the court, but also as bearing on petitioner's credibility. By her testimony in her own behalf, petitioner necessarily elected, at the least, to waive her privilege against being compelled to answer the Government's questions addressed to the very same subjects on which she voluntarily spoke. Petitioner apparently would have it that she could give a negative answer to her own counsel's question on the subject of membership

("To your knowledge, did you ever belong to any organization that taught or advocated anarchy or the overthrow of the existing government in this country?"), yet refrain from answering a Government question seeking to determine whether she had been in the Communist Party ("Are you now, or have you ever been, a member of the Communist Party of the United States?"). See R. 43.

Petitioner had the advice of counsel when she resumed the stand. She certainly must be taken to have understood that which is a commonplace even among laymen—that there is no way, in an adversary proceeding, to testify on a particular subject without being amenable to cross-examination on that subject by the other party.[2]

There may conceivably be some limitation on the broad principle that a person who voluntarily takes the stand and testifies in his own behalf waives the privilege as to *all* relevant cross-examination. Conceivably, some cross-examination which would be admissible as relevant to the issue of credibility might be deemed sufficiently far removed from the direct

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[2] No elaborate discussion is needed on the proposition that testimony which is not subject to cross-examination is not regarded as valid testimony in adversary trials. *Snyder* v. *Massachusetts*, 291 U. S. 97, 105–106; *Alford* v. *United States*, 282 U. S. 687, 691. Thus, testimony under oath before an official authorized to administer oaths is not admissible if the opposing party has not had the opportunity to cross-examine. 5 *Wigmore on Evidence* (3d ed. 1940) §§ 1373–1375. Even where a witness gives testimony at trial, but dies before he can be cross-examined, the testimony is stricken because of the absence of opportunity for cross-examination. *Id.*, § 1390; *Kemble* v. *Lyons*, 184 Ia. 804; *Sperry* v. *Moore's Estate*, 42 Mich. 361.

testimony and the central issue in the case so that it might be concluded that sustaining the privilege would not really result in the admission of testimony which was not subject to cross-examination.[8] It is unnecessary in this case to speculate on this subject. As we have shown, the questions asked petitioner on cross-examination which she refused to answer were directly relevant to the central issue in the case and directly related to her own voluntary testimony on direct. Hence, having chosen to testify, she was obliged to submit to the concomitant burden of relevant cross-examination.

The necessity that testimony be subject to cross-examination disposes of petitioner's contention that the difference between a civil and a criminal proceeding justifies a different rule as to a party in a civil case from that recognized with respect to a defendant who takes the stand in a criminal case. To be sure, the failure of a party to a civil action to take the stand may be the subject of adverse comment. We may accept petitioner's argument (Pet. Br. 17–18) that this

[8] Thus, in *United States* v. *Toner*, 173 F. 2d 140, 144 (C. A. 3), where a compellable witness asserted the privilege as to certain questions posed on cross-examination, the court rejected the claim that the direct testimony should be stricken because not subject to full cross-examination (see *infra*, pp. 19–20), on the ground that there had been cross-examination of the matters directly in issue. By a parity of reasoning, it may be argued that a voluntary witness also retains his privilege as to matters remote to the main issue.

We do not concede that such should be the rule. Rather, we think that one who voluntarily takes the stand by that fact necessarily waives the privilege as to all relevant cross-examination, whatever the reasons that impel him to take the stand.

places greater pressure on a civil defendant to testify.[4] At most, however, this difference would go to the possibility discussed above, *i. e.*, that some remote cross-examination on issues going to credibility might be deemed subject to a claim of privilege by a party to a civil suit, even though in criminal cases a defendant who chooses to testify is held to have completely waived the privilege with respect to all inquiry relevant to the charge against him.[5] It certainly cannot be decisive on the issue here, which is whether one who has chosen to give testimony must submit to that cross-examination which is necessary to give the testimony the quality of evidence, *i. e.*, cross-examination directly related to the issues in the case and to the testimony given on direct. The rule that testimony, to be evidence, must be subject to cross-examination is the same in civil and in criminal cases. And the necessity that the fundamental purpose of cross-examination shall not be defeated by claim of privilege is highlighted by the rule, applicable generally to the privilege, that, if it is to be given effect, no inference can be drawn from the fact that it is claimed. See *Johnson* v. *United States*, 318 U. S. 189, 196; *Billeci* v. *United States*, 184 F. 2d 394, 397–398 (C. A. D. C.). Petitioner is thus asking this Court to rule that she may present her version of events, without being subject to cross-examination or to any adverse inference

[4] Note, however, this Court's comment in *Raffel* v. *United States*, 271 U. S. 494, 499: "We need not close our eyes to the fact that every person accused of a crime is under some pressure to testify, lest the jury, despite carefully formed instructions, draw an unfavorable inference from his silence."

[5] *Raffel* v. *United States*, 271 U. S. 494, 497.

because of the failure to respond thereto. She seeks to convert the right to silence into a right to give only half the evidence.

No constitutional protection extends that far. In *Walder* v. *United States*, 347 U. S. 62, holding that narcotics, inadmissible as obtained in violation of the Fourth Amendment, might be introduced by the Government to contradict the defendant's untrue statements that no narcotics were taken from him, this Court observed (347 U. S. at 65):

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

Similar reasoning applies here. The Government was properly prevented from compelling petitioner, while she was an involuntary witness, to answer questions which might incriminate her. But petitioner, having thereafter elected to testify freely in her own defense, may not employ the privilege as a shield against contradiction of possible untruths asserted in that testimony.

Under our system of jurisprudence, it is no less essential to test a civil defendant's testimony in his own behalf than it is a criminal defendant's. By choosing to testify, petitioner must certainly be taken to have waived her privilege, at least as to directly relevant cross-examination covering the very subject of her direct

testimony. *United States* v. *Kenton*, 131 F. Supp. 576, 578–579 (S. D. N. Y.), affirmed, 224 F. 2d 803 (C. A. 2); *United States* v. *Brooks*, 284 Fed. 908, 910 (E. D. Mich.); *Chicago City Ry. Co.* v. *Canevin*, 72 Ill. App. 81, 93; *Roddy* v. *Finnegan*, 43 Md. 490, 502; *Andrews* v. *Frye*, 104 Mass. 234, 236. As the decisions dealing with the question of waiver by the criminally accused emphasize, an accused "* * * ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so * * *." *Caminetti* v. *United States*, 242 U. S. 470, 494. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel* v. *United States*, 271 U. S. at 499; cf. *Fitzpatrick* v. *United States*, 178 U. S. 304, 315.

As stressed above, petitioner here is on the weakest of ground. She has not the slightest basis for a claim of surprise. Not only was she fully cognizant, when she resumed the stand, that the Government aimed to question her concerning her sentiments and her activities following the date of her naturalization; she, herself, plainly entered that realm in the testimony which she proceeded to offer in her own behalf.

II

THE RULE OF WAIVER APPLICABLE TO A COMPELLED WITNESS DOES NOT APPLY TO PETITIONER'S EFFORT TO PRESENT ONLY HER OWN VERSION OF EVENTS WITHOUT BEING SUBJECT TO CROSS-EXAMINATION

Petitioner grounds her argument upon the rule, to which this Court has given approval, that normally a

witness will not be held to have waived the privilege until he has testified to incriminating facts. *Rogers* v. *United States*, 340 U. S. 367; *Arndstein* v. *McCarthy*, 254 U. S. 71; *McCarthy* v. *Arndstein*, 262 U. S. 355. She argues that since, in her direct testimony, she admitted no incriminating facts, she had the right, as an ordinary witness, to stop short when asked questions to which the answers might be incriminating. The rule, however, has no application to the facts of this case.

As we have already pointed out, petitioner is not in the position of an ordinary witness who is being compelled by process of law to give testimony. Such a witness has no choice with relation to his testimony until he is at the point when he has a right to claim his personal privilege. And, in the absence of choice, there can, of course, be no waiver of privilege. When petitioner was called as an involuntary witness for the plaintiff, the rule for which she contends was recognized and applied. It was only when petitioner went beyond that point, when she affirmatively elected to present evidence in her own behalf, that she was held to have waived her privilege.

All of the cases upon which petitioner relies involved witnesses testifying under compulsion. In *Rogers* v. *United States*, 340 U. S. 367, the petitioner was an involuntary witness compelled under subpoena to appear before a grand jury; she was not, as here, a party defendant voluntarily taking the stand in

order to present her side of the case.[6] *McCarthy* v. *Arndstein*, 262 U. S. 355, 359, affirmed on rehearing, 266 U. S. 34, and *Arndstein* v. *McCarthy*, 254 U. S. 71, 72, involved an involuntary bankrupt compelled to appear before Special Commissioners for examination under Section 21 (a) of the Bankruptcy Act; *Brown* v. *Walker*, 161 U. S. 591, 597, a witness subpoenaed before a grand jury investigating an alleged violation of the Interstate Commerce Act; *United States* v. *Hoag*, 142 F. Supp. 667 (D. C. D. C.), a witness subpoenaed before a Senate subcommittee; *United States* v. *Nelson*, 103 F. Supp. 215 (D. C. D. C.), a witness subpoenaed before a House subcommittee. In *Hoag*, *supra*, which petitioner quotes with approval (Pet. Br. 12), the District Court significantly commented (142 F. Supp. at 672):

> The [criminally accused] is not required to testify, but may make his choice of testifying or not, with the right to have the jury instructed that his failure to testify creates no presumption against him. *The ordinary, non-defendant witness is required to appear and answer questions unless he properly claims that his answer may tend to incriminate him.* [Emphasis added.]

Logic may require the conclusion that one who is compelled to appear as a witness shall not be deemed to have waived his privilege against self-incrimination

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[6] *Hoffman* v. *United States*, 341 U. S. 479; *Blau* v. *United States*, 340 U. S. 159, and *Counselman* v. *Hitchcock*, 142 U. S. 547, also cited by petitioner (Pet. Br. 12), deal not with the doctrine of waiver, but with the broader question of the scope of the privilege. In any event, they also involved compelled testimony before inquisitorial bodies.

until such time as he voluntarily discloses an incriminatory fact; for, until then, it cannot be said that he elected to speak when he might have remained silent. But that same logic no less requires the conclusion that one who has had his choice to speak or to refrain, and has knowingly elected to testify, must speak fully. There is no intermediate choice, no halfway house, between silence and the whole truth. The privilege protects the right to silence, but it is not a haven against contradiction. It does not afford an interested party the opportunity to "hit and run"—to offer self-serving testimony and then avoid that searching cross-examination which is the best guide to its reliability. One cannot "waive" for purposes of answering the questions of one's own lawyer and assert privilege for purposes of avoiding the questions of opposing counsel. The principle has particular force when the questions are addressed to the self-same subject matter.

It may be suggested that if a compelled witness, who has already testified on direct examination, frustrates cross-examination by an acceptable claim of privilege, the remedy invoked is to strike the direct testimony (cf. *State* v. *Perry*, 210 N. C. 796; *Foster* v. *Pierce*, 65 Mass. (11 Cush.) 437, 438; *Mayo* v. *Mayo*, 119 Mass. 290, 292[7]), and that this remedy, without any invocation of the contempt power, would

[7] This same principle was recognized in *United States* v. *Toner*, 173 F. 2d 140, 144 (C. A. 3), discussed in note 3, page 13, *supra*, although the court there held the matters as to which the claim of privilege was directed were so remote from the direct testimony as not to justify a ruling that the entire testimony should be stricken.

also suffice in the case of the voluntary witness.[8] The answer, of course, is that the fundamental concern of the judicial process is the development of the truth. The court and the parties are entitled to the aid of all relevant testimony. While this interest in the development of the facts must certainly give way in the face of a valid claim of privilege, it is a controlling interest when there is no privilege to assert or when the privilege has been waived. A party who appears as a volunteer witness has no option to advance and to retreat as his sense of convenience or of strategy dictates. Such a witness, we submit, is not free to answer the questions of his own counsel on a particular subject and then take refuge in a claim of privilege when questions by opposing counsel on that subject prove uncomfortable. Nothing less than the exercise of the contempt power is adequate to prevent resort to this tactic of "hit-and-run." Nothing less will protect the dignity of the courts and the integrity of their proceedings.

III

IN AFFIRMING THE CONTEMPT CONVICTION, THE COURT OF APPEALS DID NOT REWRITE THE CHARGE SO THAT IT WAS AT VARIANCE WITH THE CONTEMPT CERTIFICATE OF THE DISTRICT COURT.

Petitioner argues (Pet. Br. 19–22) that the finding of waiver by the District Court was based solely on petitioner's taking the stand; that the Court of Appeals

[8] The argument would apply in principle to the criminal defendant as well as to the civil defendant.

found waiver because of the nature of the direct testimony; and that, as a consequence, petitioner now stands convicted on a charge not made. This contention has no substance. To begin with, an examination of the trial record shows that it was petitioner's act in taking the stand *and* testifying in her own behalf, rather than the mere fact that she was voluntarily sworn as a witness, that impelled the trial court's ruling (R. 33–34, 38–40). Even supposing that the trial judge held petitioner in contempt solely because of her voluntarily being sworn in her own defense, the affirmance by the Court of Appeals would not constitute a prohibited re-evaluation of the facts. On the contrary, the affirmance by the Court of Appeals constituted, at most, a narrowing of the finding of the District Court. The Court of Appeals held in substance that, whether or not *any* testimony by petitioner would have resulted in a waiver of her privilege, the specific and lengthy testimony that was actually given in this case necessarily had that result. (R. 46.) In reaching this decision, the Court of Appeals did not rely upon a factual determination at variance with that of the District Court, but relied properly on the record before it.

In short, the affirmance by the Court of Appeals did not constitute a rewriting of the contempt certificate at variance with the District Court's determination, but at the most a finding more restricted than that of the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeal should be affirmed.

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March 1957.